LIBRARY
SUPREME COURT, U.S.
Office-Supreme Court, U.S.
FILED
JAN 30 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners*,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THUBO, and LARRY STARK, *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR THE PETITIONERS

S. G. LIPPMAN
TIM L. BORNSTEIN
RUSSELL SPECTER
1741 DeSales Street, N.W.
Washington 6, D. C.
Attorneys for Petitioners.

Of Counsel:

CLAUDE PEPPER
ALLEN CLEMENTS, JR.
1701 Meridian Avenue
Miami Beach, Florida

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	2
1. The Parties and the Contract	2
2. Proceedings in the Trial Court	5
3. The Intermediate Appeal	7
4. The Florida Supreme Court's Decision	9
SUMMARY OF ARGUMENT	12
ARGUMENT	16
I. Congress' comprehensive regulation of labor relations in commerce deprives the State courts of jurisdiction to regulate this contract and the parties' conduct in the first instance, for they are "arguably" protected or prohibited by the federal Act	16
II. Section 14(b) authorizes the States to prohibit only contracts requiring "membership in a labor organization"	24
A. The term "membership" is used in its conventional meaning in Section 14(b)	25
B. The "service fee" clause in the present contract does not require "membership" in a labor organization, nor is it a subterfuge to escape the operation of state law	28
III. The legal basis of the service fee lies in the union's duty under the Act to represent nonmembers and to make expenditures on their behalf. The service fee idea is an old one in labor relations, and it has been internationally adopted	33

Page

IV. Congress chose its words carefully in writing Section 14(b), for the legislative purpose was directed only to compulsory "membership." .. 40

V. Section 8(a)(3) authorizes the execution of agreements requiring "membership in a labor organization" as a condition of employment not merely "support money" agreements 46

VI. The relationship of *General Motors* to the instant case clearly shows that Section 14(b) is no more than a single limited exception to the Labor Act 57

VII. This Court's decision in *Algoma Plywood* is no barrier to reversal of the instant case, for it was decided on different facts, in a different context, and principally on a different statute 63

CONCLUSION 67

APPENDIX 1a

TABLE OF CASES

A.F. of L. v. Watson, 327 U.S. 582 (1946) 45
A.H. Phillips v. Walling, 324 U.S. 490 (1945) 15, 62
Adair v. United States, 208 U.S. 161 (1908) 26
Alexander Primas Co., 21 War Labor Board Reps. 219 (1943) 37
Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301 (1949) ..11, 16, 63, 65, 66
Armant v. Cannon Employees Association, 11 L.R.R.M. 752, 757 (Calif. Super. Ct. 1942) 27
Brabham v. Miller Electric Co., 237 S.C. 540, 118 S.E. 2d 449 (1962) 22
Building Construction Trades Council v. American Builders, 139 Colo. 236, 337 P.2d 953 (1959) 19
Coppage v. Kansas, 236 U.S. 1 (1914) 26
DeVries v. Baumgartner's Electric Construction Co., 353 U.S. 969 (1957) 18
DiBucci v. Ulrich, 189 N.Y. Supp. 2d 717 (N.Y. Sup. Ct. 1959) 27

Page

Electrical Workers v. Farnsworth & Chambers Co., 353 U.S. 969 (1957) 13, 16, 65
Florida Wholesale Grocery Co., 83 NLRB 852 (1949) 3
Food Fair Stores, Inc., 120 NLRB 497 (1958) 3
Food Fair Stores, Inc., 138 NLRB No. 2, 50 LRRM 1512 (1962) 3
Food Fair Stores, Inc., 307 F. 2d 3 (3rd Cir. 1962) .. 3
Garner v. Teamsters Union, 346 U.S. 485 (1953) 20, 23
General Motors, 130 NLRB 481 (1961) 52
Giant Food Shopping Center, Inc., 77 NLRB 791 (1948) 20
H. John Homan Co., 137 NLRB No. 118 (1962) 23
Higgins v. Cardinal Manufacturing Company, 188 Kan. 11, 360 P. 2d 456, cert. denied 368 U.S. 829 ..21, 47, 66
Hill v. Florida, 325 U.S. 538 (1945) 66
Hitchman Coal Co. v. Mitchell, 245 U.S. 229 (1917) .. 26
I.B.E.W., Local 349 v. Oikle, 77 So. 2d 762 (Fla. 1955) 27
International Association of Machinists v. Street, 367 U.S. 740 (1961) 31, 34
International Association of Machinists v. Gonzales, 356 U.S. 617 (1958) 26
Kaiser v. Price-Fewell, Inc., 235 Ark. 295, 359 S.W. 2d 449 (1962), cert. denied 31 U.S.L. Week 3217 22
Keystone Coat, Apron & Towel Co., 121 NLRB 880 (1958) 60
Labor Board v. General Motors Corp., No. 404, this Term 15, 18, 19, 57
Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949) 41
Local Union 429 v. Farnsworth and Chambers Co., 359 U.S. 969 (1957) 18
Local 438, Construction Laborers v. Curry, 31 U.S.L. Week 4143 (U.S. Jan. 21, 1963) 13, 16, 18, 65
Local 1976, Carpenters v. Labor Board, 357 U.S. 93 (1958) 28
Loewe v. Lawlor, 208 U.S. 274 (1908) 26
Marine Engineers Beneficial Association v. Interlake S.S. Co., 370 U.S. 173 (1962) 24
Miller v. Bldg. Service Employees, 211 N.Y. Supp. 2d 459 (N.Y. Sup. Ct. 1961) 27
Miranda Fuel Co., 140 NLRB No. 7 (1962) 34, 35
Mooney v. Bartenders, 313 P. 2d 857 (Cal. 1957) 27

Page

Muller and the Swiss Federation of Autonomous Trade Unions v. Zurich Garage Owners' Associations and Swiss Federation of Metal and Watch Workers (Zurich Branch), A.T.F. 72 II 305 (1949) 38, 39
Northway Products Co., 39 L.A. 791 (1962) 32
Pan American World Airways, 20 L.A. 312 (1953) .. 53
Piedmont & Northern R. Co. v. Interstate Commerce Commission, 286 U.S. 299 (1932) 62
Piegts x. Meat Cutters, 228 La. 131, 81 So. 2d 835 (1955) 22
Plankington Packing Co. v. Wisconsin Employment Relations Board, 338 U.S. 953 (1950) 19, 65
Radio Officers Union v. Labor Board, 347 U.S. 17 (1954) 46, 47, 54
Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956) 41, 55
Sanders v. Iron Workers, 130 F. Supp. 253 (W.D. Ky. 1955) 27
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 12, 16, 19, 23, 24
Schermerhorn v. RCIA, Local 1625, 141 So. 2d 269 (Fla. 1962) 57, 58, 59, 63
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 15, 28, 60, 61, 62
Schrank v. Brown, 80 N.Y. Supp. 2d 452 (N.Y. Sup. Ct. 1948) 27
Spokane & Inland R. Co. v. United States, 241 U.S. 344 (1916) 15, 62
Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944) 14, 34
Syres v. Oil Workers, 350 U.S. 892 (1955) 14, 34
U.A.W. Local 756 v. Woychik, 5 Wis. 2d 528, 93 N.W. 2d 336 (1958) 30
Union Starch & Refining Co. v. Labor Board, 186 F. 2d 1008 (7th Cir. 1951), cert. denied 342 U.S. 815 15, 50, 51, 52, 53
United States v. Kaiser, 363 U.S. 299 (1960) 37
United States v. Sharpnack, 355 U.S. 286 (1958) 19

STATUTES

FEDERAL STATUTES: Page

Labor Management Reporting and Disclosure Act, 1959, 73 Stat. 519, 29 U.S.C. § 401 *et seq.* 16, 27
§ 3(o) 25
§ 101(a)(1) 30

National Labor Relations Act, as amended, 1947, 61 Stat. 151, 29 U.S.C. § 151 *et seq.*
§ 1 25
§ 7 ..... 17, 25
§ 8 ..... 15, 17, 18, 19, 25
§ 9 ..... 23, 25
§ 14(a) 25
§ 14(b) 2, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 28, 29, 33, 40, 41, 42
§ 301(b) 25
§ 301(c) 25
§ 302(c) 25
§ 402(3) 25

Railway Labor Act, 44 Stat. 577, 45 U.S.C. § 151 *et seq.* 34

STATE STATUTES:

25 Fla. Stat. Ann. Const., Decl. of Rts. § 12 (Supp. 1960) 6, 7, 10, 12
Fla. Stat. Ann. 447.0 ..... 6, 7

OTHER AUTHORITIES CITED

Barbash, The Practice of Unionism 35, 36, 41
Berenstein, Union Security and the Scope of Collective Bargaining Agreements in Switzerland, International Labor Review 101 (Feb. 1962) 39
Controlling Costs in Labor Arbitration, 14 Arb. J. 26 36
Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957) 35
Dudra, Union Security in Canada, 12 Lab. L. J. 585 (1961) 39
Dyce, The Check-Off System in the Caribbean, No. 142 Free Labor World 130 (1962) 39
Gregory, Labor and the Law (Rev. Ed.) 41

Page

Jensen, Trade Union Dues in Denmark, No. 143 Free Labor World 171 (1902) 39
Kuhn, Arbitration in Transit (1952) 36
Manson, Is Arbitration Expendable, 12 NYU Conference on Labor 8 (1959) 36
Millis and Montgomery, Organized Labor (1945) 37
Shister, Aaron and Summers, Eds., Public Policy and Collective Bargaining 39

MISCELLANEOUS

So. Dakota Attorney General Op., 43 L.R.R.M. 73 (1948) 22
87 C.J.S. Trade Unions § 35(b) (1954) 30
House Conf. Rept. No. 510, 80th Cong., 1st Sess. 40
Senate Report No. 105, 80th Cong., 1st Sess. 41, 45
93 Cong. Rec. 621 42
93 Cong. Rec. 6614 42
93 Cong. Rec. 6679 ..... 42, 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners*,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Respondents*.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Florida Circuit Court of Dade County is unofficially reported at 47 LRRM 2300 (R. 14). The opinion of the Florida Supreme Court is reported officially at 141 So. 2d 269 and unofficially at 50 LRRM 2055 (R. 19).

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). The judgment of the Florida Supreme Court was entered on April 25, 1962 (R. 19). On July 19, 1962, Mr. Justice Black extended the time for filing a petition for certiorari to and including August 24, 1962 (R. 33). The petition for certiorari was granted on November 19, 1962 (R. 33).

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

1. Does § 14(b) of the Labor Act authorize the States to prohibit a contract clause under which employees, who are not required to be and who choose not to be "members" of the union, must pay service fees for the sole purpose of defraying collective bargaining costs for services which the union as exclusive bargaining agent has a statutory duty to provide?

2. Do the courts of Florida have primary jurisdiction to regulate the service fee clause of the contract and conduct at bar which are "arguably" protected or prohibited by the Labor Act?

STATEMENT

1. The Parties and the Contract

Under the terms of a collective bargaining contract, petitioner Retail Clerks, Local 1625 (hereinafter called "the union"), has been recognized as the sole and exclusive bargaining agent for a unit consisting of "all employees" in retail food stores operated by Food

Fair Stores, Inc., in five Southern Florida counties,[1] a bargaining unit of some 1900 employees (R. 2). Food Fair operates a sizeable chain of supermarkets in interstate commerce (R. 26, n. 4).[2]

The contract was executed on October 14, 1960, effective until April 15, 1963, and it establishes a number of beneficial working conditions for all employees in the bargaining unit. Typical of these are protection against discharge except for "just cause",[3] paid vacations and holidays,[4] pregnancy leaves of absence,[5] maximum hours limitations and reporting pay,[6] noncontributory life and hospitalization insurance,[7] seniority protections,[8] paid time off to vote, serve on juries and attend family funerals,[9] separation pay,[10] beneficial wage rates, annual increases,[11] and many others. All of these contract rights are subject to protection

[1] R. 13 [Art. 2, p. 1].

[2] The National Labor Relations Board has regularly asserted jurisdiction over this employer. Florida Wholesale Grocery Co., d/b/a Food Fair Stores, 83 NLRB 852 (1949), Food Fair Stores, Inc., 120 NLRB 497 (1958); Food Fair Stores, Inc., 138 NLRB No. 2, 50 LRRM 1512 (1962); NLRB v. Food Fair Stores, Inc., 307 F. 2d 3 (3rd Cir. 1962).

[3] R. 13 [Art. 4, p. 2].

[4] R. 13 [Art. 11 and 12, pp. 7-10].

[5] R. 13 [Art. 14, pp. 10-11].

[6] R. 13 [Art. 17, pp. 13-14].

[7] R. 13 [Art. 20, pp. 16-17].

[8] R. 13 [Art. 21, pp. 17-19].

[9] R. 13 [Art. 34, pp. 22-23].

[10] R. 13 [Art. 35, p. 23].

[11] R. 13 [Art. 43, pp. 26-32].

and enforcement under the contract's "Grievance and Arbitration Procedure."[12]

As exclusive bargaining agent, the union has assumed a number of duties under the contract on behalf of all bargaining unit employees, including the duty of administering the grievance and arbitration machinery. Under the arbitration clause, for example, the union has assumed these financial commitments (R. 13 [Art. 7, Sec. 2, p. 4]):

> "The expense incurred in the Arbitration proceedings such as hearing room, stenographer, transcript for each party and the Arbitrator's fees shall be divided equally between the Union and the Employer."

In addition to the panoply of benefits outlined above, Article 19 of this contract contains two sections which deal generally with methods of financing collective bargaining activities (R. 13 [Art. 19, pp. 14-16]). Under Article 19, Section 1, the employer agrees to "deduct initiation fees and dues . . . from the pay of employees who are *members* of the Union"; this is a conventional "check-off" provision. Article 19, Section 2, is the service fee clause which provides as follows (R. 13 [Art. 19, Sec. 2, p. 16]):

> " 'Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obliga-

[12] R. 13 [Art. 6, pp. 3-4].

tions and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirments of any kind to the Union.' It shall also be a condition of employment that all employees covered by this Agreement shall on the 30th day following the beginning of such employment or the effective date of this agreement, whichever is later, pay established initial and monthly service fees as shown above."

2. Proceedings in the Trial Court

In November of 1960, four bargaining unit employees (respondents herein) instituted an action in the Circuit Court of Dade County, Florida, seeking injunctive relief against the enforcement of Section 2 of Article 19, the service fee provision (R. 5-6). Plaintiffs also demanded damages and an accounting for "any initial service fees or monthly service fees [received] from plaintiffs or other non-Union employees" (R. 7).

Plaintiffs described themselves as employees who "are not and do not want to be members of the Union," who "do not want to participate in any Agency Shop relationship," and who "do not want to pay the defendant Union any dues or service fees or initiation fees" (R. 5).

The legal predicate of the complaint was the contention that plaintiffs "have the right to work free

from restraints and coercion which would be imposed on them" by Article 19, Section 2 of the contract (R. 4). In particular plaintiffs contended that the service fee provisions of the contract violated Section 12 of the Declaration of Rights of the Florida Constitution[13] and Florida Statute 447.01[14] (R. 4). Plaintiffs specifically alleged that they had been threatened with discharge unless they complied with the contract and that they were, *"in effect, being blackmailed by the defendant Union to either pay money or lose their jobs"* (R. 5).

Attached to the complaint were two exhibits: a notice to employees containing a brief explanation of the service fee arrangement (Exhibit "A," R. 7-8) and a copy of the text of Article 19, Section 2, of the contract (Exhibit "B," R. 9).

Defendants promptly moved to dismiss the complaint raising both state and federal law defenses (R. 9-10). The two federal defenses were these: 1) the contract does not require "membership" in the union, and the federal Labor Act has preempted the state courts of jurisdiction to regulate the conduct of the parties under this agreement in interstate commerce; and 2) even if the contract in question violates Florida law, the state courts have no jurisdiction to regulate the contract, for a violation of Section 12 of the Declaration of Rights of the Florida Constitution would, under the circumstances of this case, constitute a federal unfair labor practice over which the National Labor Relations Board has exclusive jurisdiction (R. 10). Defendants also filed a "Response to Application for

[13] 25 Fla. Stat. Ann. § 12.

[14] Fla. Stat. Ann. 447.01.

Temporary Injunction" in which they questioned the "Court's jurisdiction of the subject matter" for the reasons stated in the Motion to Dismiss (R. 11).

In December, 1960, a hearing was held before the Circuit Court on plaintiffs' motion for a temporary injunction and defendants' motion to dismiss (R. 14). The court "heard testimony of the plaintiffs and their witnesses and received documentary evidence on behalf of the plaintiffs and defendants and the depositions of the individual plaintiffs taken on behalf of the defendants, and heard argument of counsel" (R. 15). The trial court decided the cause in defendants' favor. It wrote no opinion but simply recited in its order dismissing the complaint that (R. 15),

> ". . . the agency shop clause, Section 2, Article 19 of the contract between defendant Union and defendant Food Fair is not violative of the Florida 'right to work law' as contained in Section 12 of the Declaration of Rights of the Constitution of Florida and Chapter 447, Florida Statutes."

3. The Intermediate Appeal

Plaintiffs appealed the dismissal of their complaint to the District Court of Appeal (R. 20). In order to preserve the federal law defenses on which the trial court had not passed, the union cross-appealed and explicitly reiterated the same federal defenses (R. 16-17). The District Court of Appeal heard arguments and filed an opinion reversing the trial court (R. 20). Before its opinion became final, however, the District Court of Appeal granted the union's motion "to withdraw its opinion and to transfer the appeal" directly to the Florida Supreme Court (R. 17-18, 20-21), for the reason that an intervening decision of the Florida Supreme Court had suggested that the District Courts

of Appeal lack jurisdiction to review decisions "construing a controlling provision of the Florida constitution" (R. 18, 21). The Florida Supreme Court accepted the direct appeal reasoning that it "possess[ed] jurisdiction to determine this cause on direct appeal" (R. 22).

As a result of a peculiar procedural development in the District Court of Appeal, the only parts of the record which were before the Florida Supreme Court were some of the pleading and the contract itself. The defendants' verified Answer, the testimony of witnesses, documentary evidence and depositions of the parties, all of which were considered by the trial court (R. 14-15), were not before the Florida Supreme Court.[15] In view of the Florida Supreme Court's dis-

[15] The explanation of the absence of the whole record is this: plaintiffs designated only the formal pleadings (except for the verified Answer) and the contract to be certified to the District Court of Appeal, on the theory that the trial court had granted defendants' motion to dismiss, which allegedly tested only the sufficiency of the Complaint, and that all other parts of the record in the trial court were superfluous and not properly subject to consideration on appeal. Defendants, however, carefully designated every other part of the record to be certified to the District Court of Appeal in support of their cross appeal, so that the whole record would be certified on appeal.

Plaintiffs then formally moved the District Court of Appeal to strike defendants' designation of the additional parts of the record on appeal, and the District Court of Appeal granted this motion. When, thereafter, the District Court of Appeal vacated its opinion and transferred the appeal directly to the Florida Supreme Court, it was assumed by all parties that the whole record had been sent to the Florida Supreme Court for consideration and that the District Court of Appeal's order, striking other parts of the record from the appeal, had been automatically vacated along with its decision.

In the Florida Supreme Court, these additional parts of the record were the subject of extensive briefing by the defendants

position of the case on the merits, the absence of this additional evidence is unimportant here, however.

4. The Florida Supreme Court's Decision

The Florida Supreme Court reversed the trial court on the merits, two justices dissenting.[16] Its opinion is in two parts: the first part is its own brief analysis of the law; the second part is the text of the vacated opinion of the District Court of Appeal which it adopted in *haec verba* as its own (R. 25).

At the outset of its own consideration of the merits, the Florida Supreme Court observed that the plain-

---

and were discussed by *all* parties in oral argument. Thus, petitioners continued to assume that the whole record was before the Florida Supreme Court.

It was not until after the Florida Supreme Court had rendered its decision and judgment that, in preparing their petition for a writ of certiorari to this Court, petitioners discovered that the trial court had never certified the whole record to the District Court of Appeal and, consequently, the whole record had not been sent to the Florida Supreme Court.

The bulk of the missing parts of the record proved, through testimonial and documentary evidence, that all employees in the bargaining unit—union members and non-members alike—have in fact enjoyed improvements in their wages, hours and working conditions as a direct and immediate result of the union's efforts and services on their behalf during the past ten years.

[16] Justices Thomas and O'Connell dissented without opinion saying only that "this court does not have jurisdiction to decide this case" (R. 31). Neither dissenting justice states whether his reference is to the issue of federal preemption, which was fully briefed and argued by the parties, or to the issue of whether the Florida Supreme Court should have reviewed this case on a direct appeal, an issue which was not briefed. After the decision was filed, counsel for respondents wrote a letter to the Clerk of the Florida Supreme Court suggesting the need for clarification. The Clerk answered that the dissenting justices were referring to the question of the direct appeal. Whether the Clerk was expressing his own opinion or was formally authorized to speak for the dissenting judges is not known.

tiffs were "non-union employees of Food Fair" who contend that the service fee contract in question "violated the 'right to work' provisions . . . of the Florida Constitution" (R. 20). This question, the court said, "has never been determined by an appellate court in this State," and it is a difficult question "because the right to work clause is not 'clear cut' when considered in connection with the facts presented in the instant case" (R. 21).

After quoting the text of Section 12 of the Declaration of Rights, the court used only a few words to invalidate the service fee clause of the contract as a matter of state law (R. 23):

> ". . . the agency shop clause is repugnant to the Constitution in that it requires the non-union employee to purchase from the labor union a right which the Constitution has given him. The Constitution grants a free choice in the matter of belonging to a labor union. The agency shop clause contained in the contract under consideration purports to acknowledge that right, but in fact abrogates it by requiring the non-union worker to pay the union for the exercise of that right or, in the alternative, to be discharged from his employment. Such an arrangement is palpably and totally inconsistent with the freedom of choice contemplated by our Declaration of Rights, Section 12."

Turning to the union's contentions that the state courts have no jurisdiction under § 14(b) of the federal Act to proscribe a true service fee contract which does not require "membership" in the union, the court below similarly disposed of this problem in just a few words (R. 24):

> "It is true that Section 14(b) specifically deals only with "agreements requiring *membership* in a

labor organization as a condition of employment . . .' However, it is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a paramount provision of the organic law of any of the several states." (Emphasis in original text.)

The opinion of the District Court of Appeal, which the state supreme court adopted as its own opinion, similarly dealt with the problem of federal preemption of state court jurisdiction quite briefly. It says that this Court's decision in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301 (1949), "sanctioned state regulation of union security agreements impinging on state right to work laws"[17] and has "not been overruled in that respect by the subsequent decisions of the United States Supreme Court dealing with this question of preemption" (R. 26). Expressing its views as to the meaning of § 14(b), the District Court of Appeal said (R. 27):

> ". . . § 14(b) of the Federal Act . . . specifically authorizes and recognizes the validity of right to work laws of the several states."

Having decided that § 14(b) was intended by the federal Congress generally to sanction the operation of right-to-work laws, the court below reasoned that Florida's right-to-work law protects the right to work free

---

[17] The Algoma case did not involve what is generally known as a "right to work" law, but involved a statute requiring a two-thirds vote as a prerequisite to entering a union shop or maintenance of membership contract.

from *any* "abridgement." This interpretation of the Florida law is expressed as follows (R. 29):

> "Under § 12 of the Declaration of Rights of Florida what is prohibited is the denial or *abridgement* of one's right to work 'on account of membership or non-membership in any labor union, or labor organization.' When, because of his non-membership, an employee is required to pay labor union dues, or sums equal to the dues, as a condition of employment or continued employment, his right to work is 'abridged.'
>
> "Anything which imposes a charge or expense upon the free exercise of a right, abridges it in the sense of curtailing or lessening the use of or enjoyment of that right. . . .
>
> * * *
>
> "The natural and reasonable interpretation of the Florida constitutional amendment, which prohibits compulsory membership in a labor organization . . . is that it necessarily forbids forcing a non-member to pay union initiation fees, dues or assessments or equivalent amounts as a condition of employment or continued employment. A contrary construction of the right to work law would leave it little or no useful purpose to serve."

Thereafter, the union sought review in this Court, pending which the Florida Supreme Court has stayed its mandate.

SUMMARY OF ARGUMENT

I. The decision below is plainly inconsistent with this Court's decisions that state courts have no jurisdiction to regulate activities which are "arguably" subject to the primary jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959). The La-

bor Board, not the state courts, must decide in the first instance whether conduct is protected, prohibited or unregulated by the federal Act, and the Labor Board must determine in the first instance the outer limits and scope of §.14(b) in relationship to the other provisions of the Act which it administers.

The instant contract does not require "membership" in a union as a condition of employment; it requires only that non-member employees pay a ratable share of the costs of collective bargaining. Whether such a contract is permitted, prohibited or entirely unregulated by federal law in a right-to-work state is a question for the Board. Section 14(b) does not confer power on the state courts to determine their own jurisdiction to regulate interstate labor relations. *Local 438, Construction Laborers* v. *Curry*, 31 U.S. L. Week 4143 (U.S. Jan. 21, 1963); *Electrical Workers* v. *Farnsworth & Chambers Co.*, 353 U.S. 969 (1957) (memorandum).

2. The concept of "membership in a labor organization," as used in § 14(b), other sections of the Taft-Hartley Act, and in other federal statutes, embraces the rights and duties of one who belongs to a private organization and is governed by its rules. "Membership" was used in the conventional sense in § 14(b) and does not include the mere payment of service fees to a labor organization.

While non-member employees under the instant contract are required to pay fees to the union, these fees differ in *purpose*, *use* and *amount* from the dues and fees paid by members of the union. The non-member enjoys none of the legally enforceable rights of union members, nor is he subject to any of the duties and re-

sponsibilities of union members: he has a special and quite limited relationship to the union. The Florida court's conclusion that such a narrow relationship constitutes a "subterfuge" to compel "membership" is based on a grave misunderstanding of the membership concept, the requirements of this contract, and the authority granted to the States by § 14(b).

3. The legal and moral basis for requiring a service fee of non-members is that the union, as exclusive bargaining agent for *all* employees in the unit, is under an enforceable duty to represent non-member employees equally and fairly. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Syres* v. *Oil Workers*, 350 U.S. 892 (1955) (memorandum); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953). This duty necessarily requires the union to expend its assets for the benefit of non-members.

Nothing in the policy of the Act denies a union the right to negotiate an agreement providing that non-members must assist in financing collective bargaining functions, nor is there any principle of American law which requires a private organization to confer a costly and valuable benefit on a third party but which deprives the organization of any right to charge for its services.

4. The legislative history of § 14(b) reveals that Congress chose its words carefully and that it was only compulsory "membership" that Congress intended to permit the States to prohibit, nothing more. In committee reports and in debates, Congress manifested its intention to permit the States to proscribe only the "closed shop" and the "union shop." Congress evidently believed that the States should have the limited

power to regulate interstate labor relations only to this extent.

There is not a scintilla of evidence that § 14(b) was intended to authorize the States to engage in detailed regulation of the substantive terms of collective bargaining agreements, unrelated to compulsory membership.

5. The argument that the States have power to *prohibit* service fee contracts under § 14(b), because § 8(a)(3) *permits* only support money contracts under federal law, is specious. Section 8(a)(3) clearly authorizes compulsory "membership" contracts, for this is the plain language of the statute. *Union Starch & Refining Co.* v. *Labor Board*, 186 F. 2d 1008 (7th Cir. 1951), cert. denied 342 U.S. 815, a leading case interpreting § 8(a)(3), if anything, confirms the view that § 8(a)(3) permits the execution of compulsory membership agreements.

6. The companion case of *Labor Board* v. *General Motors Corp.*, No. 404, is factually quite different from the instant case. It should be reversed because it is based on a misreading of the policies of § 8(a)(3), which set forth the "permissive limits" of union security contracts under federal law. Section 14(b), on the other hand, is not a statement of the "permissive limits" of state power to regulate the substantive terms of interstate labor relations; it is a single, narrow exception to the comprehensive federal scheme of regulation which should be narrowly interpreted. See, *e.g.*, *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951); *A. H. Phillips* v. *Walling*, 324 U.S. 490, 493 (1945); *Spokane & Inland R. Co.* v. *United States*, 241 U.S. 344, 350 (1916).

7. The reliance of the court below on *Algoma Plywood & Veneer Co.* v. *Wisconsin E. R. B.*, 336 U.S. 301 (1949), is misplaced. In *Algoma* the Court held only that a state had power under the Wagner Act to remedy the discharge of an employee for his failure to maintain "membership" in a union. Later cases confirm that *Algoma* does not support the exercise of state court jurisdiction under § 14(b) to regulate conduct which is arguably within the regulatory power of the Labor Board and which might conflict with other substantive provisions of the Labor Act. *Construction Laborers* v. *Curry*, 31 U.S. L. Week 4143 (U.S. Jan. 21, 1963); *Electrical Workers* v. *Farnsworth & Chambers*, 353 U.S. 969 (1957) (memorandum).

ARGUMENT

I. CONGRESS' COMPREHENSIVE REGULATION OF LABOR RELATIONS IN COMMERCE DEPRIVES THE STATE COURTS OF JURISDICTION TO REGULATE THIS CONTRACT AND THE PARTIES' CONDUCT IN THE FIRST INSTANCE, FOR THEY ARE "ARGUABLY" PROTECTED OR PROHIBITED BY THE FEDERAL ACT.

By its enactment of the National Labor Relations Act with amendments, 29 USC § 150 *et seq.*, Congress has established a "comprehensive regulation of industrial relations" which has become "an integral part of our economic life." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 239 (1959). Pursuant to Congress' scheme, this Court has repeatedly held that state courts have jurisdiction neither to impede the exercise of rights conferred by federal law nor to regulate acts prohibited by federal law. In a clear statement of this principle, the Court has said, *id.* at 244:

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate

> are protected by § 7 . . . or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

The central question in this case is whether § 14(b) of the Labor Act creates a broad exception to Congress' plan of "comprehensive regulation" which authorizes the Florida courts to prohibit the instant contract and the conduct of the parties acting under the contract. As will be shown, this contract in no respect requires "membership" in a labor organization; it merely requires bargaining unit employees, who choose *not* to become members of the union, which is their exclusive bargaining agent, to pay reasonable service fees for those collective bargaining services which they receive and which the union is legally bound to provide them. For this reason the contract and the parties' conduct pursuant thereto are "arguably" protected by § 7 of the Act, and "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Id.* at 245.

This is not the first but the fourth case to reach this Court in which state courts have sought to regulate activity "arguably" within the regulatory power of the Labor Board on the asserted ground that § 14(b) of the Act creates a broad exception to the uniform federal law. In each case this Court has held that § 14(b) does not confer plenary jurisdiction on the state courts to apply right-to-work laws in a fashion which constitutes *de facto* state regulation of such

activities. In each of these cases the state courts had ruled, as has the Florida court here, that the parties' conduct was for the object of compelling "membership" in a labor union in violation of state right-to-work laws, and in each case this Court reversed on grounds of federal preemption. *Local 438, Construction Laborers* v. *Curry*, 31 U.S. L. Week 4143 (U.S. Jan. 21, 1963); *DeVries* v. *Baumgartner's Electric Construction Co.*, 359 U.S. 498 (1959) (memorandum) *Electrical Workers* v. *Farnsworth & Chambers Co.*, 353 U.S. 969 (1957) (memorandum). In the *Curry* case, *supra*, the Court held, 31 U.S. L. Week at 4144:

> "Nor is the jurisdiction of the Georgia courts sustainable, as respondents urge, by reason of the Georgia right-to-work law and by § 14(b) of the National Labor Relations Board . . . . This precise contention has been previously considered and rejected by this Court. Local Union 429 v. Farnsworth and Chambers Co. 359 US 969, reversing 201 Tenn. . . . ., 299 S.W.2d 8."

The Labor Board has not had occasion to pass on the validity of the instant contract or the parties' conduct. While we believe that this contract is "arguably" protected by § 7 of the Labor Act, the Board alone can make this determination in the first instance. On the other hand, if this Court should affirm the decision of the Sixth Circuit in the companion case of *Labor Board* v. *General Motors Corp.*, No. 404, which holds that the service fee contract there violates § 8(a)(3) of the Act, then it would be arguable *a fortiori* that the instant contract is prohibited by the Act. While it is not necessary for this Court to decide whether a contract which violates a valid state law within the scope of § 14(b) might constitute an unfair labor prac-

tice under the Labor Act, it has been suggested that such is the intention of Congress. *Building Construction Trades Council* v. *American Builders*, 139 Colo. 236, 337 P. 2d 953 (1959). *Cf. United States* v. *Sharpnack*, 355 U.S. 286 (1958).

As the Court said in *Garmon, supra*, in "the absence of the Board's clear determination that an activity is neither protected nor prohibited," state power must yield, for it "is essential to the administration of the Act that these determinations be left in the first instance" to the Board. 359 U.S. at 244-246. The very fact that the Labor Board asserted jurisdiction over the *General Motors* case, which deals with a service fee contract under a right-to-work statute in Indiana, clearly confirms that the contract and conduct of the parties here are "arguably" subject to the Board's jurisdiction.

Respondents could have filed § 8(a)(3) unfair labor practice charges against petitioners with the National Labor Relations Board alleging, as they specifically alleged in their complaint, that they have been threatened with discharge unless they comply with this contract (R. 5). On the basis of such charges, the Board could have determined whether the contract in question is protected, prohibited or entirely unregulated by the Act. If the Board had determined as a matter of federal law that the contract is unregulated by §§ 7 and 8, respondents could then have invoked the jurisdiction of the state courts. *Cf. Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950). In considering whether the contract and the conduct of the parties in this case are protected, prohibited or unregulated by the federal Labor Act, the Board must consider the scope of § 14(b) as

it may affect the Board's administration of other provisions of the Act.

In determining the relationship of § 14(b) to other provisions of the Act, the Board may look to state law. This does not mean that the Board would interpret state law, only that the Board would use the lawful prohibitions of state law as a factor in determining whether an activity is protected by the federal law. The Board has used state law as a guidline to the administration of federal law for many years. See, *e.g.*, *Giant Food Shopping Center, Inc.*, 77 N.L.R.B. 791 (1948), where the Board interpreted § 14(b) in relationship with former § 9(e)(1) of the Act, which provided for so-called union shop authorization elections. In *Giant Food* the Board looked to the provisions of Virginia law for the purpose of deciding whether a union shop election should be conducted in the face of Virginia's right-to-work statute. The Board did not interpret the state statute; it merely interpreted § 14(b), an integral part of the federal Act, as a limiting factor in the Board's administration of former § 9(e)(1). This is precisely the problem which the Board alone must resolve in the instant case, *viz.*, whether § 14(b), in relationship to other provisions of the Act, allows the States to strip the service fee contract of the protection of the Act.

The Board must have primary jurisdiction to determine the limit and scope of § 14(b) in this case to assure the "uniform application of [Congress'] substantive rules to avoid . . . diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490 (1953). Unless the States defer to the primary jurisdiction of the Board

to determine the outer limits of § 14(b), the States would be free to decide their own jurisdiction and power in these matters with intolerable consequence for the administration of the federal Act.

The Florida Supreme Court, deciding its own jurisdiction under § 14(b), has construed Congress' purpose as approving the unfettered operation and application of state "right to work" laws in interstate commerce, despite the words used in § 14(b) and the legislative history showing that Congress intended only to allow the states to enact anti-closed shop and anti-union shop statutes. Thus the Florida court said (R. 24):

> "We hold, as did the Supreme Court of Kansas in the case of Higgins v. Cardinal Manufacturing Company, 188 Kan. 11, 360 P. 2d 456, that *Section 14(b) . . . preserves the jurisdiction of the states in matters involving state 'right-to-work' provisions.*" (Emphasis added.)

And, further, the Florida court held (R. 27):

> "This exception from the federal pre-emption doctrine seems an obvious one brought about by § 14(b) of the Federal Act, which *specifically authorizes and recognizes the validity of right to work laws of the several states.*" (Emphasis added.)

The Florida court's interpretation of § 14(b) to permit it to decide its own power and jurisdiction has been adopted by several other States to reach results which are patently inconsistent with § 14(b) and with the administration of the whole Labor Act.

South Carolina and Arkansas, for example, have construed their right-to-work laws as prohibiting exclusive, non-discriminatory hiring hall arrange-

ments. *Brabham* v. *Miller Electric Co.*, 237 S.C. 540, 118 S.E. 2d 167 (1961); *Kaiser* v. *Price-Fewell, Inc.*, 235 Ark. 295, 359 S.W. 2d 449 (1962), cert. denied 31 U.S. L. Week 3217 (U.S. 1963).

South Dakota, by its Attorney General, and Louisiana by its supreme court, have gone so far as to hold that it is violative of their right-to-work laws for a union to enter into an exclusive bargaining contract with an employer. *So. Dakota Attorney General Op.*, 43 L.R.R.M. 73 (1948); *Piegts* v. *Meat Cutters*, 228 La. 131, 81 So. 2d 835 (1955). The Florida supreme court cited and quoted from the *Piegts* case with approval (R. 29-30) for the proposition that the Florida right-to-work law, like the Louisiana law, prohibits any "abridgement" of the right-to-work—regardless (not just "because of") of membership or non-membership in a labor organization.

The Supreme Court of Louisiana in *Piegts* interpreted its right-to-work law, which is almost identical to the Florida law, to prohibit a union's serving as the exclusive bargaining agent in the State of Louisiana. The Louisiana court said, 228 La. at 139:

> "Would a non-union man's rights be diminished, reduced, curtailed, or shortened if a union acted as his agent? We answer that question in the affirmative.
>
> "There are instances where the union demands higher hourly wages and shorter hours. In order to be gainfully employed to support his family, a non-union man might be willing to make concessions. Liberty of contract is the non-union man's prerogative."

This result under Louisiana's law, approved by the Florida court, is profoundly inconsistent not only with

§14(b) but also with § 9(a) of the Labor Act, which provides that "representatives designated . . . for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the *exclusive representatives of all employees* in such unit for the purpose of collective bargaining . . ."

As we read the Florida court's decision, it goes far beyond the prohibition of the service fee arrangement in this contract, for it would similarly prohibit *any* collectively bargained arrangement which requires non-member employees to assist financing collective bargaining functions in any respect. It would assuredly prohibit an exclusive, non-discriminatory hiring hall arrangement requiring the payment of a reasonable fee, however lawful the arrangement under federal law. See *H. John Homan Co.*, 137 N.L.R.B. No. 118 (1962). It would prohibit an arrangement requiring all bargaining unit employees to contribute to a fund to finance the cost of arbitration cases alone. It might also prohibit required contributions to a union-employer administered pension or welfare fund.[6] None of these common contract clauses has anything to do with "membership" in a labor union, and they are all typical products of free collective bargaining.

For these reasons, Florida's regulation of the contract and conduct of the parties must give way to the primary jurisdiction of the Board, for state court assertion of jurisdiction over this subject matter is an impermissible interference with Congress' plan for a "centralized administration of specially designed procedures . . . necessary to obtain uniform application of its substantive rules." *Garner* v. *Teamsters Union*, 346 U.S. 485, 490 (1953); *San Diego Building*

Trades Council v. *Garmon*, 359 U.S. 236 (1959); *Marine Engineers Beneficial Association* v. *Interlake S. S. Co.*, 370 U.S. 173 (1962).

II. SECTION 14(b) AUTHORIZES THE STATES TO PROHIBIT ONLY CONTRACTS REQUIRING "MEMBERSHIP IN A LABOR ORGANIZATION."

Section 14(b) authorizes the States to proscribe only the "execution or application of agreements requiring *membership* in a labor organization as a condition of employment" (emphasis added). The contract in question does not require "membership in a labor organization." On the contrary, it expressly disclaims any such requirement by providing that "Employees shall have the right to voluntarily join or refrain from joining the Union" (R. 9). Because the instant contract does not compel "membership," it may properly be concluded that its operation is beyond state regulatory power under § 14(b).

Petitioners do not contend that their contract is immune from state regulation solely because "membership" is not required of employees in *haec verba*, for we concede that the States might have power to proscribe a contract which patently requires "membership" through an obvious subterfuge intended to evade state law. By parity of reasoning, however, Florida cannot justify its prohibition of a true service fee contract under § 14(b) merely by asserting that such an arrangement requires "membership," regardless of the language and effect of the contract's terms.

The substantive problems remain: 1. What does "membership" mean in § 14(b)?; and 2. Is the service fee requirement of the instant contract in reality a requirement of "membership"? We shall deal with these questions *seriatim*.

A. The Term "Membership" Is Used in Its Conventional Meaning in Section 14(b).

The Labor Act does not define "membership in a labor organization," although it makes at least nineteen separate references to the terms "member" of and "membership" in a labor organization. These references throughout the Act reveal that Congress used these terms in the sense of satisfying the requirements for full participation in the legal activities of a private oganization governed by its own rules.[18]

In § 3(o) of the Labor-Management Reporting and Disclosure Act, 1959, a recent Congressional statute which not only extensively regulates relations between unions and their members but which also includes substantial amendments to the Taft-Hartley Act, Congress defined the term "member" of a labor organization in a manner wholly consistent with common English usuage and consistent with its usage in the Taft-Hartley Act. 29 U.S.C. § 402(o), 73 Stat. 521.

> "(o) 'Member' or 'member in good standing', when used in reference to a labor organization, includes any person who has fulfilled the require-

---

[18] In the Labor Act as amended in 1947, these sections used the terms "members" of or "membership" in a labor organization: §§ 1, 7, 8(a)(3), 8(b)(1)(A), 8(b)(2), 8(b)(5), 9(b), 9(f)(4), 9(f)(5), (9(f)(6), 9(g), 14(a), 14(b), 301(b), 301(c), 302(c), and 402(3).

Section 9(f), for example, which was repealed in 1959, required labor organizations to file informational reports with the Secretary of Labor as a condition precedent to using the N.L.R.B.'s facilities. This information included the dues required to "remain members in good standing," "qualification for or restrictions on membership," and other matters relating to a union's internal affairs.

ments for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization."

This Court has dealt with the concept of "membership" in a labor organization many times in a variety of contexts, always in the sense of *belonging* to an organization whose members have rights as well as duties. See, e.g., *Adair* v. *United States*, 208 U.S. 161 (1908); *Loewe* v. *Lawlor*, 208 U.S. 274 (1908); *Hitchman Coal Co.* v. *Mitchell*, 245 U.S. 229 (1917); *Coppage* v. *Kansas*, 236 U.S. 1 (1914).

The rights and duties of membership in a union are governed by its constitution and by-laws, subject to amendment or repeal by its members. Almost universally the law of the States regards the relationship between a union and its members as a contractual arrangement which is judicially enforceable. *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 618-619 (1958) (*dictum*).

". . . . under California law membership in a labor union constitutes a contract between the member and the union, the terms of which are governed by the constitution and by-laws of the union, and that state law provides, through mandatory reinstatement and damages, a remedy for breach of such contract through wrongful expulsion. *This contractual conception of the relation between a member and his union widely prevails in this country* and has recently been adopted by the House of Lords in Bonsor v. Musicians' Union, [1956] A.C. 104." (Emphasis added.)

The Florida Supreme Court itself had held that a member's relations with his union are subject to "the rules of the organization by which he had agreed to be governed." *I.B.E.W., Local 349,* v. *Oikle,* 77 So. 2d 762, 765 (Fla. 1955), and that union members agree upon entering a union "to abide by its rules and decisions, or submit to disciplinary action, or expulsion." *Harper* v. *Hoecherl,* 153 Fla. 29, 32, 14 So. 2d 179, 180 (1943).

The member's interest in his membership is a valuable "property right" which is "entitled to be protected in its enjoyment." *Armant* v. *Cannon Employees Association,* 11 L.R.R.M. 752, 757 (Calif. Super. Ct. 1942). The state courts have for many years protected the rights of members against arbitrary expulsion and discipline,[19] to be a candidate for office and to vote in elections,[20] to inspect the union's books and records,[21] to preserve the autonomy of their local organization against arbitrary suspension,[22] and many other rights which are peculiarly those of membership.

Many common law rights of union members have recently been codified in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 400, *et seq.* This statute, *inter alia,* protects the rights of "members" to free speech, to nominate candidates for office, to due process in any disciplinary proceeding,

---

[19] *E.g.,* Sanders v. Iron Workers, 130 F. Supp. 253 (W.D. Ky. 1955); Miller v. Bldg. Service Employees, 211 N.Y. Supp. 2d 459 (N.Y. Sup. Ct. 1961).

[20] *E.g.,* DiBucci v. Ulrich, 189 N.Y. Supp. 2d 717 (N.Y. Sup. Ct. 1959).

[21] *E.g.,* Mooney v. Bartenders, 313 P. 2d 857 (Cal. 1957).

[22] *E.g.,* Schrank v. Brown, 80 N.Y. Supp. 2d 452 (N.Y. Sup. Ct. 1948).

to free elections, to local autonomy, and to hold their officers to a fiduciary standard.

Having deliberately used the words "membership in a labor organization," a phrase with meaning vested by decisions of many courts and many statutes, Congress did not intend to allow the States to prohibit any other kind of contract arrangement in interstate commerce. The words of § 14(b) should be given their normal and conventional meaning not only because § 14(b) constitutes an exception to the otherwise uniform and comprehensive federal regulation of interstate labor relations but also because the Taft-Hartley Act itself was "the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation," and the words used in the Act were, therefore, carefully chosen. *Local 1976, United Brotherhood of Carpenters* v. *Labor Board*, 357 U.S. 93, 99-100 (1958). The words of § 14(b) are plain words; as a limited exception to the otherwise uniform federal law, these words should be given their "normal and customary meaning." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 388 (1951).

B. The "Service Fee" Clause in the Present Contract Does Not Require "Membership" in a Labor Organization, Nor Is It a Subterfuge to Escape the Operation of State Law.

If "membership" as used in § 14(b) embraces the rights and duties of one who has joined a union, does the contract clause here which Florida has prohibited require "membership" of employees as a condition of employment? Article 19, Section 2, of this contract

requires non-member employees "to pay as a condition of employment, an initial service fee and monthly service fees to the Union *for the purpose* of aiding the Union *in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent* of the employees in the appropriate bargaining unit" (R. 9). Aside from the payment of service fees, the contract explicitly guarantees that "employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the union" (R. 9).

Without the benefit of any evidence as to the administration and operation of this contract, judging it only on its face, and without any analysis whatsoever of the meaning of the "membership" concept, the Florida Supreme Court simply concluded that this service fee arrangement was a "subterfuge" in the sense that it is really a requirement of "membership" stated in different terms but, nevertheless, intended to achieve the result of requiring membership in the union. The Florida court's unspoken analysis may have been based on this syllogism: members pay money to their union; the contract requires employees to pay money to the union; therefore, the contract requires "membership" in the union. The Florida court's analysis is as wrong as it is simple. Indeed, the Florida court appears to have said that any kind of enforced association with a union constitutes "membership" and may be prohibited under §14(b).

While members pay money to their union in the form of dues and non-members are required to pay money to the union in the form of service fees, this is the only fact common to the member and the non-member. Even this common fact is not without

profound distinctions in terms of the *purpose* to which such monies may be used by the union, the *amount* to be paid to the union, and the *manner* in which the amount is determined. In every other respect, the member of the union and the non-member stand in a totally different relationship to the union.

The member enjoys an enormous variety of legally enforceable rights: to participate in elections, meetings, benefit plans, to stand for office, to elect officers, to vote on contracts, to attend conventions, to be a shop steward, etc.[23] The member is also subject to a number of duties under the union's constitution and bylaws, which may be legally enforced: to attend meetings, to keep confidences, to respect picket lines, to pay special assessments, etc.[24] The non-member has no such rights and no such duties.

The payment of service fees to a membership organization, without becoming a member, is a common experience: one may be required to pay taxes to a state, although one does not thereby become a citizen; one may pay tuition to attend a parochial university, without thereby becoming a co-religionist; one may pay to receive treatment in a Shriners' Hospital, without joining the Shrine.

---

[23] Labor-Management Reporting and Disclosure Act, 1959, 73 Stat. 522, 29 U.S.C. § 411(a)(1):

> "Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections . . ., to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings. . . ."

[24] See, *e.g.*, U.A.W. Local 756 v. Woychik, 5 Wis. 2d 528, 93 N.W. 2d 336 (1958). See generally, 87 C. J. S. Trade Unions § 35(b) (1954).

A member's dues may be used for a variety of purposes, in addition to meeting the union's costs of collective bargaining. Rather typically, unions use their members' dues to promote legislation which they regard as desirable and to defeat legislation which they regard as undesirable, to publish newspapers and magazines, to promote free labor institutions in other nations, to finance low cost housing, to aid victims of natural disaster, to support charities, to finance litigation, to provide scholarships, and to do those things which the members authorize the union to do in their interest and on their behalf.

Under the instant contract, however, the service fees paid by non-members are restricted and can be used only "for the purpose" of "defraying costs" incurred by the union in performing collective bargaining services (R. 9). Use of service fees for purposes other than "defraying costs" of collective bargaining for employees in this bargaining unit would presumably be subject to the grievance and arbitration machinery of the contract and might additionally give rise to a common law or § 301(a) contract action.[25] *Cf. International Association of Machinists* v. *Street*, 367 U.S. 740 (1961). An employee who believed that his fee payments were being used for unauthorized purposes, for example, could refuse to pay on these grounds, and the issue of his right to refuse to pay could be submitted by the union to the grievance machinery to determine whether the employer has a duty to discipline such an employee.

---

[25] Article 6, Section 1, of the contract provides that "*any* differences, disputes or complaints arising over the interpretation or application of the contents of this Agreement" shall be subject to the grievance machinery and abitrable thereunder (R. 13 [p. 3]).

The *amount* of *dues* charged union members under this contract is entirely an internal union matter, subject only to the democratic action of its members. With respect to changes in the union's dues for members, the employer has no voice, and changes in union dues would not be arbitrable under the contract. On the other hand, the amount charged non-members as service fees, solely "for the purpose" of aiding the union in "defraying costs" of collective bargaining, has been fixed and established by the contract.[26] While the amount of the service fee might change as the union's collective bargaining costs change, it must always bear a close relationship to actual collective bargaining costs.

Just as the union's improper use of service fees under this contract might be the subject of a grievance or common law action, so too the grievance machinery might be invoked or a lawsuit commenced if the union seeks to collect service fees which exceed its actual costs.[27]

---

[26] In *Northway Products Co.*, 39 L.A. 791 (1962), an arbitrator ruled that non-member employees under an agency shop agreement were, unlike members, not required to pay an initial service fee to the union because the contract made no such requirement for non-members. This case illustrates the principle involved in the instant case that the *amount* or fees charged non-members is subject to the contract's grievance machinery.

[27] Unfortunately, this action was instituted just a month after this contract became effective, and for this reason the parties had no time in fact to begin the process, contemplated in the contract, of computing the union's costs as a basis for formulating the amount of service fees to be charged. At the very outset, therefore, the record shows only that the parties began the operation of the contract by requiring non-member employees to pay amounts in fees equal to membership dues then in effect (R. 8). This was a starting figure which in the absence of any experience in an

In every possible respect, therefore, the non-member service fee under this contract does not fit within the "membership" concept in § 14(b), for the non-member neither enjoys the rights nor bears the duties of the member. He pays impersonally for services of value rendered to him, without acquiring any of the social, economic and moral commitments of membership.

It is inescapably clear, therefore, that Florida has not regulated a contract requiring "membership," but a contract which does not require "membership."

III. THE LEGAL BASIS OF THE SERVICE FEE LIES IN THE UNION'S DUTY UNDER THE ACT TO REPRESENT NON-MEMBERS AND TO MAKE EXPENDITURES ON THEIR BEHALF. THE SERVICE FEE IDEA IS AN OLD ONE IN LABOR RELATIONS, AND IT HAS BEEN INTERNATIONALLY ADOPTED.

The service fee concept has a legal and moral basis in the union's enforceable duty, as exclusive bargaining agent, to represent *all* bargaining unit employees, regardless of their membership. It is premised on the self-evident proposition that one who is required to provide valuable services should suffer no loss for having conferred a direct benefit.

Respondents alleged in the trial court that they "are not and do not want to be members of the Union,"

---

accounting sense was obviously an arbitrary figure. Whether over a period of a year or more the service fee would have become less than membership dues is of course speculative.

The amount of the fees here has never been challenged as to reasonableness in terms of the value received. Moreover, the plaintiffs in their complaint attacked the requirement that they be charged any fees for any purposes (R. 5): ". . . plaintiffs do not want . . . . to pay defendant Union *any* dues or service fees."

Similarly the Florida Supreme Court ruled that any required fee payment in any amount and for any purpose is prohibited by the Florida law as an "abridgement" of the right to work (R. 29).

neither do they want to pay "*any*" service fees to the Union (R. 5). They made no complaint, however, about the reasonableness or fairness of the fees in relation to the services and benefits which they have and will continue to receive as an immediate result of the union's efforts and expenditures on their behalf. While respondent's might prefer to be completely free of any association with petitioners, Justice Douglas has wisely said that "Some forced associations are inevitable in an industrial society." *International Association of Machinists* v. *Street*, 367 U.S. 740, 775 (1961) (concurring opinion).

Petitioner union, as the selected majority bargaining agent for the unit in which respondents are employed, is, like a legislature, "under an *affirmative constitutional duty* equally to protect" respondents' rights. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 198 (1944). (emphasis added). This duty requires "the union, in collective bargaining and in making contracts . . . to represent non-union or minority union members . . . without hostile discrimination, fairly, impartially, and in good faith." *Id.* at 204.

The duty of fair representation applies not only to unions subject to the Railway Labor Act but equally to unions under the Taft-Hartley Act. *Syres* v. *Oil Workers*, 350 U.S. 892 (1955) (memorandum). Under the Taft-Hartley Act, the "bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). The National Labor Relations Board has recently held that the exclusive bargaining agent's duty of fair representation is also enforceable through Taft-Hartley's unfair labor practice sanctions. *Miranda*

Fuel Co., 140 N.L.R.B. No. 7 (1962). See generally, Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957).

It would be a strange doctrine which places a labor organization under an enforceable legal duty to represent non-member employees in collective bargaining, requiring the expenditure of members' money on their behalf, but which deprives the union of the right to charge such non-members the actual cost of those services. Indeed, the union's required expenditures for non-members, if not recoverable through a reasonable service fee, might raise a question of deprivation of property without due process. We can think of no other analagous situation in American law where an essentially private organization, vested with a public interest, can be legally required to spend money for the benefit of third parties with no right of recovery. Not even privately owned utilities—which are much more closely regulated than unions—are required to provide services without charge.

The Court may take judicial notice that the costs of collective bargaining are substantial, for, as the subjects of collective bargaining have increased over the decades, the bargaining agent's duties and expenses have proportionately increased.[28] Among these costs are the following:

1. *Negotiating Contracts:* Payment of officers, representatives, and outside experts for bargaining table participation and advanced planning; compensating employee members of bargaining committees for time spent away from their jobs;

---

[28] See generally, Barbash, The Practice of Unionism 185-195.

expenditures for meeting rooms, and related expenses such as printing contracts.[29]

2. *Policing and Administering Contracts:* Investigating grievances; routine patrolling of contract terms; processing grievances through the grievance machinery up to arbitration; securing advice as may be required from economists, engineers, lawyers, accountants, actuaries, and even doctors.

3. *Arbitration:* It is a problem of widespread concern that the costs of submitting a grievance to arbitration have increased enormously in recent years.[30] The contract in question lists some of them and requires the union to pay half: "hearing room, stenographer, transcript for each party, and the Arbitrator's fees" (R. 13 [Article 6, Section 2, p. 4].) Some arbitrable issues additionally require the union to use the services of lawyers and other professionals.

4. *Other Costs:* A myriad of other costs of collective bargaining devolve upon the bargaining agent, including maintaining an office for record-keeping and meetings, strikes, picketing, lawsuits, filing unfair labor practice charges, operating

---

[29] "The injection of expertise into negotiations has brought with it experts. Lawyers, economists, engineers, insurance consultants are prominent figures in the negotiations or in the background of negotiations," Barbash, The Practice of Unionism 190.

[30] Manson, Is Arbitration Expendable, 12 NYU Conference on Labor 8-14 (1959); Controlling Costs, in Labor Arbitration, 14 Arb. J. 26-29.

The costs of a single arbitration case have been as high as $175,000. Kuhn, Arbitration in Transit 188 (1952), quoted in Manson, *ibid.*

credit unions, making time and motion studies, participating in the administration of health, welfare and pension trusts and counseling members.

The services of the bargaining agent are so varied that during strikes, for example, unions pay strike benefits which support non-members and their families as well as members. See *United States* v. *Kaiser*, 363 U.S. 299, 300-301 (1960).

For these reasons it is simply nonsense to assert that a service fee arrangement is a subterfuge to compel "membership." The union's legally enforceable duty is to represent *all* employees regardless of membership. It has no choice. Elementary fairness, therefore, dictates that the union be permitted to charge non-members for the services which the union must provide them, where the employer voluntarily agrees to such an arrangement in collective bargaining.

The service fee arrangement has been known in American industry for many years.[31] It was even ordered for inclusion in contracts by the War Labor Board. *E.g.*, *Alexander Primas Co.*, 21 War Labor Bd. Reps. 219, 221 (1943).

The philosophical and labor relations justification for a fair, ratable service fee arrangement has been

---

[31] Millis and Montgomery, Organized Labor 484 (1945). The authors of this famous treatise point to the execution of an "agency shop" agreement with a major tobacco manufacturer in 1942. Describing the purpose of such a contract, they observe, at p. 484:

> "This type of arrangement spreads union costs equally over those who benefit from the collective-bargaining agreement but leaves individuals free to participate in the union, or not, or to form other unions."

lucidly articulated in a recent report by Saul Wallen, Patrick Fisher and Lewis M. Gill, acting as members of the President's Boeing Aerospace Board. (Report to the President, President's Boeing Aerospace Board 12-13, Jan. 2, 1963.)

> ". . . The union by law is the bargaining agent for all employees in the unit. The benefits it negotiates must be granted to all employees, members and non-members alike. Neither it nor the company can discriminate by limiting the benefits to union members alone. Hence non-members automatically benefit from the union's negotiating efforts. But only the union members foot the bill.
>
> "This condition inevitably rankles the . . . employees who carry the full cost. The resentments engendered must be a divisive influence in the work force, a moral depressant with concomitant effects on efficiency.
>
> "It is axiomatic that taxation without representation is tyranny. The reverse is equally true. The enjoyment of the fruits of representation without payment of one's proportionate share of the cost is similarly repugnant."

The service fee concept, which requires non-members to pay a ratable share of the costs for the services which they enjoy, is by no means a uniquely American notion.

The Swiss Federal Court, for example, had upheld the legality of a service fee arrangement for non-members known in Swiss law as "loyalty to the contract" combined with a "solidarity levy." *Muller and the Swiss Federation of Autonomous Trade Unions* v. *Zurich Garage Owners' Associations and Swiss Federation of Metal and Watch Workers (Zurich*

Branch), A.T.F. 72 II 305 (1949), quoted in Berenstein, Union Security and the Scope of Collective Bargaining Agreements in Switzerland, International Labor Review 101, 113 (Feb. 1962):

> ". . . . it would not be fair to allow an outsider, without making any financial sacrifice, to benefit by the many advantages afforded by a collective agreement, in negotiating and implementing which the contracting organizations have incurred considerable expenditure that has been met out of their members' contributions."

In Denmark, labor organizations administer the national unemployment insurance program, and non-union workers are required to pay an added premium of one-third to the labor organization in their industry to help defray its costs in administering the program. Jensen, Trade Union Dues in Denmark, No. 143 Free Labor World 171 (1962).

Canada, which often is given credit for having originated the "agency shop," has widely adopted service fee arrangements. Shister, Aaron and Summers, Eds., Public Policy and Collective Bargaining 101-102 (1962). See also, Dudra, Union Security in Canada, 12 Lab. L.J. 585, 592-593 (1961).

There has recently emerged a service fee system of financing bargaining functions in the Caribbean area which "allows a worker to remain a non-unionist, while he pays the weekly union subscription like everyone else." Dyce, The Check-Off System in the Caribbean, No. 142 Free Labor World 130, 131 (1962).

Both in law and in fact, therefore, the service fee arrangement in Article 19, Section 2, of the instant contract cannot be regarded as either a compulsory

membership arrangement or as a subterfuge to compel "membership." It is instead a natural concomitant of the union's legally enforceable duty to spend sums for services for non-members.

IV. CONGRESS CHOSE ITS WORDS CAREFULLY IN WRITING SECTION 14(b). FOR THE LEGISLATIVE PURPOSE WAS DIRECTED ONLY TO COMPULSORY "MEMBERSHIP." THE LEGISLATIVE HISTORY REFLECTS NO POLICY TO PERMIT THE STATES TO PROHIBIT A TRUE SERVICE FEE ARRANGEMENT.

Section 14(b) as finally enacted was drafted entirely in a Conference Committee. (See House Conf. Rept. No. 510, pp. 17-18, 80th Cong., 1st Sess., 1 Leg. Hist. of LMRA 521-522.) It had a predecessor in § 13 of H.R. 3020 which passed the House. (1 Leg. Hist. of LMRA 207-208.)

> "Sec. 13. Nothing in this Act shall be construed to invalidate any State law or constitutional provision which restricts the right of an employer to make agreements with labor organizations *requiring as a condition of employment membership in such labor organization*, and all such agreements, insofar as they purport to impose such requirements contrary to the provisions of the law or constitution of any State, are hereby divested of their character as a subject of regulation by Congress under its power to regulate commerce among the several States and with foreign nations, to the extent that such agreements shall, in addition to being subject to any applicable preventive provisions of this Act, be subject to the operation and effect of such State laws and constitutional provisions as well." (Emphasis added.)

Congress' purpose in enacting Section 14(b) was to authorize the states to enforce "anti-closed shop" and "anti-union shop" laws.

As this Court has said, "§ 14(b) of the Taft-Hartley Act . . . makes the union shop agreement give way before a state law prohibiting it." *Railway Employees Dept.* v. *Hanson,* 351 U.S. 225, 232, n. 5 (1956). In both legal and labor relations terminology, a closed shop is one in which employees are required to be *members* of a union *before* they may be employed, and the union shop, on the other hand, is one in which employees are required to become *members* at some time *after* they have been employed.[22]

In Senate Report No. 105, which accompanied S. 1126, there is a revealing discussion of compulsory union membership under the Wagner Act, which suggests that it was the Committee's belief that even under the Wagner Act the States were free to legislate on the subject of the "closed shop." (Senate Rept. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. of LMRA 412.)

> "When the committees of the Congress in 1935 reported the bill which became the present National Labor Relations Act, they made clear that the proviso in *section 8(3) was not intended to override State laws regulating the closed shop.* The Senate Committee stated that 'the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal.'" (Emphasis added.)

---

[22] Justice Black has observed that the terms "closed shop" and "union shop" are sometimes used synonomously. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U.S. 525, 527, n. 2 (1949), but both phrases, however used, refer to union membership as a condition of employment. *Cf. Railway Employees Dept* v. *Hanson,* 351 U.S. 225, 231, n. 3 (1956).

See also Gregory, Labor and the Law 115 (Rev. Ed.); Barbash, The Practice of Unionism 156.

The debates in the House similarly suggest that Section 13 of H.R. 3020 was intended to authorize the States to ban the "closed shop." Thus, Representative Barden of North Carolina explained to Representative Hoffman, in an extended colloquy, that Section 13 of H.R. 3020 was intended to achieve this result. (93 Cong. Rec. 621, 1 Leg. Hist. of LMRA 748.)

> "It [Section 13] is dealing with a very technical question of regulating commerce between the several states and in view of the fact that many of the states have passed laws dealing with the closed shop, why, then, the committee felt that the states should be recognized and their laws should certainly be given full power and effect as far as a state is concerned."

In the Senate debates, similar understandings of the purpose of § 14(b) as reported by the Conference Committee are expressed. For example, Senator Morse made the following observations about § 14(b). (93 Cong. Rec. 6614, 2 Leg. Hist. of LMRA 1561.)

> "Mr. President, we are dealing under a national policy with interstate commerce. The jurisdiction of the National Labor Relations Board is limited to interstate commerce cases and issues. *But this amendment proposes that we except from the national policy as it relates to interstate commerce national jurisdiction over these matters as they involve the closed shops and union shops in the case of any state which passes an anti-closed shop or anti-union shop bill.*" (Emphasis added.)

Senator Taft, a principal sponsor of the bill, explained in a Senate debate why § 14(b) had been approved by the Senate conferees. (93 Cong. Rec. 6679, 2 Leg. Hist. of LMRA 1596-1597.)

"I merely wish to make it clear that in the report of the Committee on Labor and Public Welfare to the Senate, we stated that in our opinion there was nothing in the bill as originally reported by the committee which in any way would invalidate the provisions of a State law prohibiting the closed shop. That statement appears in the committee report to the Senate, on page 6. In it we pointed out that when the National Labor Relations Act was enacted, it was made clear in the report at that time that the proviso in section 8(3) was not intended to override State law regulating the closed shops. At that time the Senate committee stated that the bill did nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal.

"In other words, the whole spirit of the Wagner Act and its provisions would prohibit a closed shop, because it prohibits discrimination against people who are not members of labor unions. *In order to preserve that right and to keep the Wagner Act itself from abolishing the closed shop everywhere, it was necessary to write in this proviso.* But that did not in any way prohibit the enforcement of State laws which already prohibited closed shops.

"That has been the law ever since that time. It was the law of the Senate bill; and in putting in this express provision from the House bill, we in no way change the bill as passed by the Senate of the United States." (Emphasis added.)

During the same colloquy with Senator Taft, Senator Barkley also expressed the view that § 14(b) of the Conference Bill was intended only to authorize the

operation of state anti-closed shop laws.[33] And in a radio address following President Truman's veto, Senator Taft urged that the conference bill be passed over the presidential veto. In this speech Senator Taft again suggested, in an obvious reference to § 14(b), that it was intended merely to allow the application of state anti-closed shop and anti-union shop laws in interstate commerce.[34]

From the foregoing recital of the legislative history of § 14(b), it is perfectly clear that Congress' specific concern in this provision was to permit the States to prohibit the "closed shop" and the "union shop." Compulsory membership was Congress' concern, and it was compulsory membership alone which Congress authorized the States to proscribe.

In 1947, while Congress was considering this legislation there were some 12 states which prohibited

---

[33] 93 Cong. Rec. 6679, 2 Leg. Hist. of LMRA 1597:

"Mr. BARKLEY. The provision of the measure which exempts any state from the operation of its provisions, if such state has outlawed the closed shop therefore in effect adopts the state as the agency through which the regulation of interstate commerce shall take place insofar as the closed shop is regulated.

"Mr. PEPPER. That is exactly correct.

"Mr. BARKLEY. So in the states whose legislatures desire to exempt their own interstate companies from the operation of this law all they need to do is to pass a law outlawing the closed shop. Thus they will affect both interstate as well as intrastate companies."

[34] 93 Cong. Rec. A. 3232, 2 Leg. Hist. of LMRA 1627:

"The president criticizes the provision that state laws prohibiting union shops are to remain in effect. He does not tell you that this is the provision of the Wagner Act which has never undertaken to authorize closed-shop agreements if the state law prohibits them."

agreements requiring membership in a union as a condition of employment. The Senate Labor Committee specifically mentions the Florida law here in question. Senate Report No. 105 to accompany S. 1126 notes that "these regulatory measures have not received authoritative interpretation by the Supreme Court," citing *A. F. of L.* v. *Watson*, 327 U.S. 582 (1946). S. Rept. No. 105 on S. 1126, p. 6, 1 Leg. Hist. of LMRA 412.

Congress' contemporaneous understanding of the purpose of these state laws—which Congress sought to authorize—is clearly revealed in the *Watson* case, *supra*, which challenged the validity of the Florida law on grounds that it violated First and Fourteenth Amendment rights and that it was in conflict with the Wagner Act. This Court held that a test of the constitutionality of this law was premature because it has not yet been construed by the state courts. In describing the Florida law, the Court said, 327 U.S. at 586:

> "The theory of the appellants is that *the law in question outlaws any agreement which requires membership in a labor organization* as a condition of employment all of which we refer to herein as the closed shop." (Emphasis added.)

In his Statement Opposing Jurisdiction, the Attorney General of Florida said to this Court that the Florida law: (No. 448, October Term, 1945)

> "prohibit(s) the making and enforcing of the 'closed shop' or as appellants call them 'union security agreements.' The people of Florida have decided that they do not want the 'closed shop.'" (At p. 3.)

Thus, the legislative history demonstrates that Congress' purpose in § 14(b) was simply to preserve the operation of anti-closed shop and anti-union shop statutes which prohibited compulsory membership, nothing more or less. In the face of this clear and definite legislative history, the Florida court's expansive views of its authority under this limited exception to the comprehensive federal law is totally unwarranted.

V. SECTION 8(a)(3) AUTHORIZES THE EXECUTION OF AGREEMENTS REQUIRING "MEMBERSHIP IN A LABOR ORGANIZATION" AS A CONDITION OF EMPLOYMENT, NOT MERELY "SUPPORT MONEY" AGREEMENTS.

Although this Court has said that the "language of § 8(a)(3) of the Act[35] is not ambiguous," *Radio*

---

[35] "Sec. 8. (a) It shall be an unfair labor practice for an employer— . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made . . ., Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Officers Union v. *Labor Board*, 347 U.S. 17, 42 (1954), some state courts have read into § 8(a)(3) a non-existent ambiguity to support their view that the federal law does not permit the execution of contracts which actually require "membership" in a union. They assert that § 8(a)(3) permits at a maximum a "support money" contract. Thus, they say, because § 8(a)(3) does not really permit compulsory membership but only an agency shop in practical effect, Congress must have intended to authorize the States to prohibit an agency shop under § 14(b)—regardless of Congress' language. Undoubtedly, it will be so argued here.

The Supreme Court of Kansas, for example, in *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 459 (1961), *cert.* denied 368 U.S. 829 (1961), has so argued (118 Kan. at 23, 360 P. 2d at 465):

> ". . . Congress intended that an employee who paid the required union initiation fees and dues fulfilled his obligation under a union shop contract, and that *the union could not require any other act as a condition of employment* usually required prior to becoming a member. Therefore, since the payment of union dues and fees is the only support of the union permitted by federal law *for unions to require as a condition of employment* under union-security agreements, and not actual membership, the expression 'membership in a labor organization as a condition of employment' in section 14(b) of the Taft-Hartley Act becomes synonymous with payment of union dues and fees for enforcement purposes under union-security agreements so far as labor unions and employers are concerned." (Emphasis in original.)

The first proviso of § 8(a)(3) provides that "nothing . . . shall preclude an employer from

making an agreement with a labor organization . . . . to require as a condition of employment *membership* therein on or after the thirtieth day following the beginning of such employment . . ." Thus, if § 8(a)(3) and § 14(b) are parallel in any respect, the parallel is only between the *first* proviso of § 8(a)(3), which authorizes agreements requiring *membership*, and § 14(b), which authorizes the States to prohibit agreements requiring *membership*. In other words, § 14(b) permits the States to prohibit only what is otherwise allowed under the first proviso to § 8(a)(3), but it does not permit the States to prohibit required service fee payments which are unrelated to membership.

If the analysis of the Kansas court were correct, then Congress chose a most awkward way to express its intention. Had Congress' intention been that ascribed to it by the Kansas court, Congress would have expressed itself directly to permit the states to prohibit under § 14(b) that which is otherwise permitted under § 8(a)(3). Congress would simply have permitted the States to prohibit not only agreements requiring membership but also agreements requiring any payments of any kind to a union. A number of right-to-work states have realized that a prohibition of compulsory membership does *not* embrace the prohibition of fee payments, and they have expressly prohibited the required payments of "dues, fees or other charges of any kind to any labor union." Miss. Code Ann. § 6984.5, Sec. 1(e), Supp. 1958. Moreover, several such state statutes were passed shortly before the Taft-Hartley Act, so that it may be assumed that Congress simply did not intend to permit the States to prohibit service fee contracts under § 14(b). See, e.g., N.C. Gen. Stat. Ann. § 95-82 (effective March 18,

1947), and Tenn. Code Ann. § 11412.10 (effective February 21, 1947).

The view that § 8(a)(3) does not in reality permit a contract requiring "membership" rests on a misreading of the language and purpose of this section's second proviso. Part (A) of the second proviso limits an employer's power to *discriminate* against an employee's job rights under a union membership contract if "membership" itself is not made available by the union to all bargaining unit employees on the "same terms and conditions generally applicable to other members." Thus, part (A) of the second proviso, if anything, underscores § 8(a)(3)'s authorization for compulsory membership, for it provides only that a union may not establish discriminatory or unequal terms for acquisition of membership, if the contract requires employees to become union members.

Part (B) of the second proviso to § 8(a)(3) similarly restricts an employer's power to *discriminate* against an employee's job rights under a membership contract if the union *denies* or terminates membership for reasons other than the payment of uniform and periodic dues and fees. Thus, part (B), like part (A), merely limits an employer's right to discriminate against an employee's job rights if the union's own standards for acquiring and retention of membership exceed a requirement of dues and fees payments and if, for this reason, *membership* is denied.

Neither part (A) nor part (B) of the second proviso limits the right of an employer and a union to compel union "membership"; however, a union may not impose unequal terms for acquiring and retaining membership [Part (A)] and may not make membership contingent upon *standards* other than dues and

fees [Part (B)] if the union seeks to cause discrimination against an employee for non-membership. "Membership" is what § 8(a)(3) permits parties to require, not the mere payment of support money to the union without membership.

Certainly under § 8(a)(3) parties may write a union shop agreement which states the requirement that all employees must become "members" of the union. Employees do join the union in response to such a stated requirement. If only dues and fees could lawfully be required under § 8(a)(3), it would be unlawful to negotiate a contract requiring "membership," but no one has even suggested such result. Thousands of such compulsory membership contracts now exist and are recognized as lawful by the Board and the courts.

Union Starch & Refining Co. v. *Labor Board*, 186 F. 2d 1008 (7th Cir. 1951), *cert. denied* 342 U.S. 815, has been sometimes misread as interpreting § 8(a)(3) to mean that the only lawful requirement which may be imposed on an employee "as a condition of employment" is the payment of uniform dues and fees, without regard to union "membership." This reading is inaccurate.

Three employees were discharged in *Union Starch* at a union's request because they had tendered union membership dues and fees but were either unable or unwilling for religious reasons to comply with *other* conditions of membership, *i.e.* filling out a membership application, attending a union meeting and taking a member's oath. The Board, reversing its trial examiner, concluded that these employees were *"willing" to join* the union but were unwilling to comply with other *conditions of membership* estab-

lished by the union. As a result of their failure to comply with these other membership conditions, they were *denied membership* and consequently were discharged. The Board's majority ruled that it was unlawful to discharge these employees because *membership* had been *denied* them in the face of their willingness to join. *Union Starch & Refining Co.*, 87 N.L.R.B. 779, 785 (1949).

On appeal, the Seventh Circuit agreed with Board's analysis. Like the Board, the court found that the employees were willing to join the union but that, for failure to comply with extraneous conditions of membership, they had been denied membership. In support of its conclusion, the Seventh Circuit relied on Senator Taft's explanation on the floor of the Senate as to § 8(a)(3)'s meaning, 186 F. 2d at 1012, quoting from 93 Cong. Rec. 4272:

> "The union could refuse the man admission to the union . . . but *if he were willing to enter the union* and pay the same dues as other members of the union he could not be fired from his job because the union refused to take him." (Emphasis added.)

If there is any doubt that *Union Starch* stands for the proposition that membership may be required under § 8(a)(3), the Board's brief in this Court, in opposition to the petition for a writ of certiorari, eliminates it. N.L.R.B. Brief in Opposition to Pet. for Cert. at p. 16, Oct. Term, 1951, No. 64.

> "The Board's interpretation of proviso (B), like that of the court below, *rests on the premise that the employees here not only tendered dues and fees but also manifested a desire to become union members.*" (Emphasis added.)

In its original *General Motors* decision, 130 N.L.R.B. 481 (1961), at least two and probably a majority of the members of the N.L.R.B., for reasons not here relevant, indicated that the *Union Starch* permits parties to require actual membership.[36]

[36] Member Jenkins observed about the Board's *Union Starch* decision, 130 N.L.R.B. at 496:

> "In a decision which considers at length the legislative history of the provisos to Sec. 8(a)(3), the Board concluded that *proviso (B) protects the employee who tenders the requisite amount of dues and initiation fees and is denied membership* for any other reason . . . It concluded that if a union 'imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job.' While this gives the employee the privilege of refusing with impunity to comply with additional requirements for membership, or of membership, *it cannot be said to equate 'membership' with the payment of periodic dues and initation* fees." (Emphasis added.)

Chairman Leedom agreed with Member Jenkins' view of the meaning of § 8(a)(3), for he said, *id.* at 486:

> "Note 7. By 'literal membership' I mean the right of a union to require actual membership as a condition of employment, and a willingness to admit to membership all employees who tender the requisite initiation fees and dues; cf. Union Starch & Refining Company, 87 NLRB 779; Radio Officers' Union v. NLRB, 347 U.S. 17, *supra*. *Neither of these cases stands for the proposition that payment of initiation fees and dues can be required when literal* membership cannot." (Emphasis added.)

Member Kimball did not discuss *Union Starch* in his separate concurring opinion, but he expressed agreement with the "ultimate result" reached by Chairman Leedom and Member Jenkins. It may, therefore, fairly be said that a majority of the Board has recently agreed that § 8(a)(3), as interpreted by *Union Starch*, requires actual membership in the union, not merely the payment of money to the union.

A leading arbitration decision similarly had held that, under a compulsory membership contract, an employee's duty is to join the union, not merely to tender dues and fees. *Pan American World Airways,* 20 L.A. 312 (1953). There arbitrator Aaron Horvitz, while dealing with a union and an employer subject to the Railway Labor Act, relied on the legislative history of § 8(a)(3) of the Taft-Hartley Act and particularly on *Union Starch.* Of *Union Starch,* the arbitrator said, 20 L.A. at 315:

> "That case was decided on the assumption that the employees had requested membership but had been refused because of their unwillingness to comply with certain conditions."

Mr. Horvitz supports his conclusion with a careful recitation of the legislative history of § 8(a)(3), 20 L.A. at 315:

> "The language of the committee reports likewise indicates that an obligation to seek union membership was clearly contemplated. The House report explained that the parties might make an agreement *'requiring employees to become and remain members of the Union'* and added, significantly, that 'Employees have 30 days to decide *whether or not to join the union.*' House Rep. No. 245 on H.R. 3020, p. 9 . . . A provision in the House bill, later dropped, guaranteed the right to resign from a union. But the committee was careful to note that if a union-shop agreement were in effect 'his resigning may result in his losing his job.' Id. p. 32. This was surely a recognition that the employee's manifested willingness to be a member was relevant, quite apart from his willingness to pay dues." (Emphasis added.)

Senator Taft's unambiguous explanation similarly was relied on, 20 L.A. at 316:

> ". . . we have proposed a proviso in the case where a man is refused admittance to a union, when an employer employs a nonunion man, and during the first 30 days *he goes to the union and says, 'I want to join the union,'* but the union refused to take him . . . In effect we say, 'If you are going to have a union shop, then you must have an open union.' " (93 Cong. Rec. 3953.) (Emphasis added.)

Although this Court has not decided the full scope of the "membership" requirement in the first proviso of § 8(a)(3), in relationship to part (B) of the second proviso, the Court has on at least two occasions suggested that part (B) does not convert the first proviso into a mere support money requirement unrelated to membership. In *Radio Officers Union* v. *Labor Board*, 347 U.S. 17 (1954), which dealt principally with the problem of what constitutes discrimination "to encourage" union membership, the Court commented on the legislative history and policies underlying § 8(a)(3) and § 8(b)(2) as follows, 347 U.S. at 40-42:

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership 'was not available to the employee on the same terms and conditions generally

applicable to other members' or if 'membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.' Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination. This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus, Congress recognized the validity of unions' concern about 'free riders,' i.e., employees who receive benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason. *Thus an employer can discharge an employee for nonmembership in a union* if the employer has entered a union security contract valid under the Act with such Union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned." (Emphasis added.)

Similarly, sustaining the constitutionality of the union membership authorization requirement of the Railway Labor Act, § 2 Eleventh, as amended, 64 Stat. 1238, 45 U.S.C. § 152 Eleventh, which is substantially like § 8(a)(3), the Court's decision suggests that the power to negotiate union membership agreements is not merely a "support money" authorization. *Railway Employees Dept.* v. *Hanson*, 351 U.S. 225 (1956). The Court describes the required payment of dues, fees and assessments as "conditions to union membership authorized" by the Act. *Id.* at 235. Implicit in the

Court's analysis of the constitutional objections to the union shop authorization in that Act is the assumption that membership is what Congress there permitted parties to require. *Id.* at 236-238.

> "It is said that once a man *becomes a member* of these unions he is subject to vast disciplinary control and that by force of the federal Act unions now can make him conform to their ideology.
>
> "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. *It is argued that compulsory membership will be used to impair freedom of expression.* But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.' If other conditions are in fact imposed, or if the exaction of dues, initiation fees or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case . . . We express no opinion on the use of other conditions to secure or maintain *membership* in a labor organization operating under a union or closed shop agreement." (Emphasis added.)

Thus, the argument that § 8(a)(3) does not in reality permit a "membership" requirement, but only a support money requirement, is fallacious, for it ignores the language of § 8(a)(3), the legislative history and the cases interpreting it. While we assume that respondents will attempt to make this argument here, the court below did not rely on this argument at all.

VI. THE RELATIONSHIP OF GENERAL MOTORS TO THE INSTANT CASE CLEARLY SHOWS THAT SECTION 14(b) IS NO MORE THAN A SINGLE, LIMITED EXCEPTION TO THE LABOR ACT.

In granting certiorari to the Sixth Circuit in *Labor Board* v. *General Motors,* No. 404, this Term, and in scheduling the instant case to be argued following *General Motors,* the Court has recognized the important statutory and factual relationship between these two cases.

While both of these cases have been loosely termed "agency shop" cases, they differ in significant factual respects. The clause in *General Motors* requires non-member employees to pay amounts *equal* to the union's membership dues and fees. *General Motors* v. *Labor Board,* 303 F. 2d 428 (6th Cir. 1962). The *amount* of the fees in *General Motors* is strictly tied to the union's dues schedule, subject to change unilaterally by the union's membership and is altogether beyond the control of the grievance machinery of the contract. Moreover, the *purpose* of the fees and the *use* to which the fees may be put in *General Motors* are unrestricted, and the union in *General Motors* presumably is free to use fees so received for purposes other than meeting actual costs of collective bargaining.

In *Schermerhorn,* however, as pointed out earlier, the contract fixes the amount of fees to be paid at the level of actual collective bargaining costs, and the union's membership has no power to change the amount of the fees. The *Schermerhorn* contract similarly limits the *purpose* for which fees may be collected from non-members solely to defraying the union's collective bargaining costs on behalf of non-members. The use of such fees for non-collective bargaining purposes would give rise to a grievance

under the contract, and a grievance could be filed if the union sought to charge non-members fees in excess of the union's actual collective bargaining costs.

Whether the contract in *General Motors* might lawfully be proscribed by a state under § 14(b) as one requiring "membership" is a question of fact not here present, and the Court is not required to decide whether the clause in the *General Motors* contract would be valid under Florida law. Moreover, while we believe that the service fee clause in *Schermerhorn* is perfectly lawful under § 8(a)(3) of the federal Act because it does not "encourage" membership in the union, the Court need not decide finally whether the *Schermerhorn* clause is lawful as a matter of federal law.[37]

In deciding whether the agency shop contract in *General Motors* might properly be regulated by the States under § 14(b), a determination would be made, on the basis of a full factual record, whether the

---

[37] Although we believe it is unnecessary for the Court to consider the ultimate legality of the *Schermerhorn* service fee arrangement under federal law, we believe that its legality is beyond question, for it is a non-discriminatory arrangement freely arrived at as a result of good faith collective bargaining.

It is our view that the *Schermerhorn* contract not only is not prohibited by § 8(a)(3) of the Act but that it is completely outside the scope and contemplation of § 8(a)(3) which prohibits "discrimination . . . to encourage membership" in a union. Giving employees the freedom to choose between membership and the right to remain completely aloof from membership by paying collective bargaining service fees is the optimum of personal liberty. Whatever a worker's reasons—personal, religious, or ideological—the *Schermerhorn* contract permits the worker to decide for himself whether he desires formal association with the Retail Clerks Union as a member or whether he desires to remain completely independent of the union's goals, its constitution and its disciplinary power over members.

requirements made of employees under that contract are so nearly like the requirements of "membership" in § 14(b) that the States may properly regulate it. Thus, in an appropriate proceeding, the Board would look to such factors as the amount of fees charged non-members, the use to which such fees are put, the right of non-members to participate in the union's internal affairs, and other such factors. This is, in short, the traditional kind of fact finding process in which the Board has always engaged. While we cannot here speculate how the Board might view the *General Motors* contract if its validity were challenged in Florida, it is sufficient here to observe that the factual difference between the *General Motors* contract and the *Schermerhorn* contract are significant.

Because the *General Motors* case has been scheduled for argument with *Schermerhorn*, it might be argued by respondents that, if the Board's decision in *General Motors* validating that agency shop agreement is sustained by this Court under § 8(a)(3) (which would require reversal of the Sixth Circuit's decision), then the Florida decision should automatically be affirmed in *Schermerhorn*. This argument would be based on the assumption that, if permission to require "membership" under § 8(a)(3) of the Act includes the lesser permission to provide the alternative of "membership" or "fee payments," then the States' power to prohibit agreements requiring "membership" under § 14(b) should similarly include the lesser power to prohibit the alternative of "membership" or "fee payments." While this argument is facile, it is predicated on patently unsound assumptions.

The first and complete answer to this argument is that the policies of §§ 8(a)(3) and 14(b) are dis-

tinctly different. Section 8(a)(3) sets forth the "permissive limits"[38] of union security allowed under the Act, and it exhibits no hostility to other forms of union security which require less of employees than compulsory membership. Surely, for example, a contract would be lawful under § 8(a)(3) if it required employees to become union members within 100 days after their initial employment rather than 30 days.

On the other hand, § 14(b) does not set forth the "permissive limits" of state power at all. This section merely authorizes the states to create a single, narrow exception to Congress' comprehensive regulation of labor relations in interstate commerce. Thus, § 8(a)(3) is a permissive section, which permits the parties to experiment and to choose between a variety of arrangements to finance collective bargaining functions which require no more of employees than compulsory membership, while § 14(b) is a limited exception to the uniform federal policy, which does not permit the States to expand their power in a way which might create conflicts with the substantive and procedural power of the Board in its administration of the Act.

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), illustrates the principle that, when Congress permits the States to establish exceptions to a uniform plan of regulation, the words of the exception must be given "their normal and customary meaning." *Id.* at 388.

Schwegmann Bros. dealt with the Miller-Tydings Act of 1937 which amended § 1 of the Sherman Act to permit the States to legalize "contracts or agreements

[38] *Keystone Coat, Apron & Towel Co.*, 121 NLRB 880, 884 (1958).

prescribing minimum prices for the resale" of certain commodities.[39] In the absence of this specific statutory exception, such contracts or agreements would violate the Sherman Act. Louisiana enacted a so-called "non-signer" statute which provided that, once a distributor enters into a price fixing agreement with any retailer in the state, all other retailers who know of the agreement are required to sell the product at not less than the price stipulated in the agreement, even though they are not parties to the agreement. The Louisiana statute created a civil cause of action against retailers who, although not parties to such a price fixing agreement, knowingly sold products at prices below those fixed in the agreement.

The question in *Schwegmann Bros.* was whether Congress' permission to the States to enact a single immunity from the Sherman Act (i.e., to immunize "contracts and agreements" to fix prices) similarly authorized the States to immunize agreements which bound non-signing retailers to such agreements. Holding that the immunity created by the Miller-Tydings Act was "a limited immunity," the Court said that the "omission of the non-signer provision from the federal law is fatal to respondents' position unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it." *Id.* at 388. The Court concluded, *id.* at 395:

> "In other words, . . . it would seem that if the nonsigner provision as well as the 'contract' provision of state law were to be written into federal law, the pattern of the legislation would have been different.

[39] 50 Stat. 693, 15 U.S.C. § 1.

> "We could conclude that Congress carved out the vast exception from the Sherman Act now claimed, only if we were willing to assume that it took a devious route and yet failed to make its purpose plain."

In the case at bar, just as in *Schwegmann Bros.*, the Florida court's view of § 14(b), an exception to the comprehensive scheme of regulation of interstate labor relations, requires the assumption that Congress "took a devious route and yet failed to make its purpose plain." There is nothing in the legislative history, as pointed out above, to suggest that Congress intended to permit the States to convert a narrow exception into a broad field of state regulation. Indeed, the legislative history is precisely to the contrary.

The Court has often said that exceptions to broad, federal regulatory acts should be read carefully and exactly. In *A. H. Phillips* v. *Walling*, 324 U.S. 490, 493 (1945), for example, the Court said:

> "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people."

This is merely an expression of the basic rule of statutory interpretation that "exceptions from a general policy which the law embodies should be strictly construed." *Spokane & Inland R. Co.* v. *United States*, 241 U.S. 344, 350 (1916); *Piedmont & Northern R. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299, 311-312 (1932).

The Court should, therefore, reverse *General Motors* because the Sixth Circuit misconstrued the policies of

§ 8(a)(3), and it should similarly reverse *Schermerhorn* because it failed to give the words of § 14(b), an exception to uniform federal policy, "their normal and customary meaning" and further because it grossly misconstrued the policy of § 14(b).

VII. THIS COURT'S DECISION IN ALGOMA PLYWOOD IS NO BARRIER TO REVERSAL OF THE INSTANT CASE, FOR IT WAS DECIDED ON DIFFERENT FACTS, IN A DIFFERENT CONTEXT, AND PRINCIPALLY ON A DIFFERENT STATUTE.

Both the court below and other state courts have read *Algoma Plywood & Veneer Co.* v. *Wisconsin E.R.B.*, 336 U.S. 301 (1949), as "sanction(ing) state regulation of union security agreements impinging on state right to work laws" (R. 26), without regard to the substantive content of the "union security agreement." This reading is erroneous.

Algoma sustained state court jurisdiction to remedy the discharge of an employee under a "maintenance of *membership*" agreement which had been executed in violation of a Wisconsin statute prohibiting agreements encouraging "membership" in a union, without prior approval by two-thirds of the affected employees in a secret ballot election. 336 U.S. at 303-304. Because the contract there had been adopted in violation of the state statute, the Wisconsin Board ordered the employer to cease "requiring as a condition of employment that any employee become or remain a member of the union." *Wisconsin E.R.B.* v. *Algoma P. & V. Co.*, 252 Wis. 549, at 553, 32 N.W. 2d. 417, at 419 (1948).

The discharge in *Algoma* occurred before the enactment of Taft-Hartley, but the state court judgments were entered after its passage. This Court's main concern, therefore, was whether the Wagner Act "gave affirmative protection to the employer in discharging

an employee under a union-security agreement for failure to maintain union *membership.*" 336 U.S. at 305 (Emphasis added.). Based on the legislative history, the Court concluded that the sponsors of the Wagner Act did not mean "to deny effect to State policies inconsistent with the unrestricted enforcement of union-shop contracts." 336 U.S. at 306. Moreover, the Court said that it was unnecessary to consider whether the States had been preempted of the power of "concurrent" regulation over labor relations in commerce "so long as Congress has not manifested an unambiguous purpose that it should be supplanted." 336 U.S. at 312.

The Wagner Act, unlike Taft-Hartley, did not undertake comprehensive regulation of union security agreements, and it contained no union unfair labor practices at all. There was no preemption by federal law under the Wagner Act, therefore, because Congress had not there comprehensively legislated in the field.

Turning to the question of whether the Taft-Hartley Act after 1947 retroactively deprived the state courts of power to regulate a union membership requirement, the Court referred to § 14(b), intending mainly to answer a specious argument made by the petitioner. The Court said of § 14(b), 336 U.S. at 314:

> "It is argued, however, that the effect of this section is to displace State law which 'regulates' but does not wholly 'prohibit' agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any 'application' of a union-security contract, such as discharging an employee, which under the

> circumstances 'is prohibited' by the State, the legislative history of the section would dispel it."

At most, therefore, this Court has said that § 14(b) authorizes the States to remedy a discharge which constitutes an application of an agreement requiring "membership" in a union. Compare *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950) (memorandum).

Recent preemption decisions of the Court striking down state court *applications* of right-to-work laws to picketing suggest that the *Algoma* case was never intended to authorize the States to apply their right-to-work laws indiscriminately to contracts and conduct in commerce where it is "arguable" that the N.L.R.B. has primary jurisdiction. See *Construction Laborers* v. *Curry*, 31 U.S. L. Week 4143 (U.S. 1963); *Electrical Workers* v. *Farnsworth & Chambers*, 353 U.S. 969 (1957) (memorandum).

Notwithstanding the narrow facts on which the *Algoma* decision was based, the state courts have relied upon one *obiter dictum* in *Algoma* as authorizing the States to proscribe service fee arrangements under § 14 (b):

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union security agreements." 336 U.S. at 313-314.

This dictum preceded the Court's reference to § 14 (b), and for this reason the Kansas Supreme Court, for example, has said that *Algoma* definitively interpreted § 14(b) as confirming state court jurisdiction to "pursue their own more restrictive policies," including the

prohibition of service fees. *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, at 29, 360 P. 2d 456, at 469 (1961). This is an unwarranted reliance, for in the context of *Algoma* the dictum means only that § 14(b) authorizes the States to pursue union-security policies which are "more restrictive" than the membership requirement authorized by federal law. In other words, the Court merely said that the States may prohibit "membership" which is a union security policy more "restrictive" than the § 8(a)(3) authorization. Surely this single dictum cannot support the Florida court's view that federal regulation by the Labor Board must give way to state court jurisdiction whenever a state asserts that its right-to-work law governs conduct or a contract in commerce.

Did Congress intend by § 14(b) to authorize the states to exercise this kind of life-and-death control over labor relations in commerce? The *Algoma* case surely did not decide this question. An examination of the scheme of the whole statute compels a negative answer, for Congress did not alter the bed-rock national labor policy to eliminate "obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining" when it enacted § 14(b). Section 1, 29 U.S.C. § 151. The Court's language in striking down another Florida statute, which sought to license union representatives, is equally applicable to Florida's regulation of the instant contract: It " 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress,' " which "cannot be created consistently with the Federal Act." *Hill* v. *Florida*, 325 U.S. 538, 542-543 (1945).

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Florida should be reversed and vacated.

Respectfully submitted,

S. G. Lippman
Tim L. Bornstein
Russell Specter
1741 DeSales Street, N.W.
Washington 6, D. C.
Attorneys for Petitioners.

Of Counsel:

Claude Pepper
Allen Clements, Jr.
1701 Meridian Avenue
Miami Beach, Florida

January 30, 1963

APPENDIX A

Section 8(a)(3) of the National Labor Relations Act, 61 Stat. 15, 29 U.S.C. § 158(a)(3), provides as follows:

It shall be an unfair labor practice for an employer . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with any labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than

> the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . .

Section 14(b) of the National Labor Relations Act, 61 Stat. 151, 29 U.S.C. § 164, provides as follows:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 12 of the Declaration of Rights of the Florida Constitution, § 12, 25 Fla. Stat. Ann., provides as follows:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.